(1)

Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

DEAN ROBERT ANCHOR,

Petitioner,

vs.

R.Q. HICKMAN, ACTING WARDEN, MULE CREEK STATE PRISON, AT IONE, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED

1. Whether, within the meaning of *Slack v. McDaniel*, 529 U.S. ___, 146 L.Ed.2d 541, 555, 120 S.Ct. ___ (2000), a Certificate of Appealability should have issued in this case, due to the denial and refusal of the U.S. District Court to hold an evidentiary hearing on whether petitioner could have discovered a key trial witness through the exercise of due diligence that would have reduced a second degree murder conviction to manslaughter because of petitioner's severe intoxication at the time of the homicide?

2. Whether, under the facts and allegations of the instant 28 U.S.C. 2254 petition, could a U.S. District Court deny the petition without holding an evidentiary hearing?

3. Whether, within the provisions of *Hohn v. United States*, 524 U.S 236, 118 S.Ct. 1969, 141 L.Ed.2d 242, allowing the seeking of Certiorari from the Denial of a Certificate of Appealability, a United States Circuit Court must specify the reasons for *denial* of that certificate in order to enable the petitioner for Certiorari to adequately formulate the basis for seeking Certiorari?

4. Whether a conflict exists within decisions of the United States Court of Appeals for the Ninth Circuit that suggest and require this Court to grant Certiorari to establish when evidentiary hearings must be held in 28 U.S.C. 2254 petitions?

5. Whether the doctrine of "equitable tolling" should be recognized by this Honorable Court as it affects the available one year filing period under the AEDPA and 28

QUESTIONS PRESENTED – Continued

U.S.C. 2244(d)(1) where, as here, the death of a key defense investigator precluded earlier preparation of a state writ of habeas corpus, and a serious automobile accident suffered by retained counsel affected more earlier filing of the 28 U.S.C. 2254 petition, both being issues of fact necessarily developed in an evidentiary hearing? See *Calderon v. United States District Court* (*Kelly*), 163 F.3d 530, 541 (9th Cir. 1998).

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Dean Robert Anchor, petitioner, seeks a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the order entered September 21, 2000, denying a Certificate of Appealability.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit denied a Certificate of Appealability in this case on September 21, 2000, following application to that Court.

The United States District Court for the Northern District of California denied the 28 U.S.C. 2254 petition on September 29, 1999, and again on November 29, 1999, without holding an evidentiary hearing. Copies of these orders/rulings appear in the appendix.

JURISDICTIONAL GROUNDS

(i) The United States District Court for the Northern District of California denied the 28 U.S.C. 2254 petition on September 29, 1999, and again on November 29, 1999. No evidentiary hearing was held. A copy of those Denials appears at Appendix A-1.

(ii) The United States Court of Appeals entered an Order denying a Certificate of Appealability without stating any factual or legal reason, merely quoting 28 U.S.C. 2244(d)(1) on September 21, 2000. A copy of that Order appears at Appendix B-1.

(iii) Jurisdiction to review by Certiorari a decision of a United States Circuit Court in a criminal case is provided under 28 U.S.C. 1257.

UNITED STATES CONSTITUTION PROVISIONS AND STATUTES INVOLVED

SIXTH AMENDMENT, U.S. CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT, U.S. CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 UNITED STATES CODE 2244(d)

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 UNITED STATES CODE 2253

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

While the complete statement of the facts of this case is prolix, what follows is presented to herald the issues warranting the Grant of Certiorari to resolve standards to govern required evidentiary hearings in 28 U.S.C. 2254 petitions, where said hearings were denied by both State courts in state habeas corpus petitions, and by the United States District Court for the Northern District of California in the instant 28 U.S.C. 2254 petition:

1. On or about July 3, 1985, petitioner Anchor was living in an apartment in the home of

his father, who had left the City of Santa Cruz, California, for a few days.

2. Petitioner telephonically sought the services of an "out call" massage service, who responded by sending a female to the home.

3. Petitioner was/became under the influence of drugs or alcohol before the arrival of the female masseuse, and when she arrived, and during her stay, an altercation/dispute arose between the female and petitioner, the female suffering death due to being struck in the head.

4. Petitioner left the home, wandering for days in a stupor in the general City of San Francisco environs, eventually finding his way into a hospital where he became identified, and eventually arrested for the death of the masseuse, her body having been found by petitioner's father and police simultaneously after petitioner's father returned home.

5. Petitioner's girl friend, one Virginia Anderson, had telephoned petitioner at the apartment shortly before the homicide occurred, and found petitioner, easily recognized to be so, under the influence of drugs/alcohol, exhibiting slurred speech, and other indicia of that condition.

6. The district attorney of Santa Cruz County called Virginia Anderson as a prosecution witness, presumably learning from Anderson petitioner's condition, but never asking her about the phone call that enabled Anderson to learn of the condition; the

prosecutor not only told Anderson not to talk to defense counsel, but actually hid Anderson from defense counsel during the trial at a non-designated, non-revealed motel. As a consequence, trial defense counsel could not, and did not have a chance to learn of petitioner's condition.

7. The prosecutor called an "expert" witness psychiatrist who opined before the jury that there was no indication that petitioner had been under the influence of drugs/alcohol, and that the cause of the death of the female masseuse was willful and uncontrolled rage/anger on the part of petitioner due to lack of achieving "sexual satisfaction" from the female masseuse.

8. Petitioner, due to his excessive intoxication/drug use, could not remember the events, and could supply no help to his trial counsel concerning the use of alcohol/drugs shortly prior to the calling of the female masseuse to the residence.

9. The girl friend, Virginia Anderson, disappeared, changed her name due to marriage, and left California, and efforts of both the office of the State Public Defender and private lawyers to locate her were unsuccessful, until she was located and interviewed by a licensed private investigator and current counsel on November 17, 1996, in/near Portland, Oregon. That interview was taped, and was to be completely transcribed to writing for Virginia Anderson's signature.

10. During December, 1996, the investigator died of an apparent heart attack, but the

investigator's wife located the taped interview, providing it to counsel who caused it to be transcribed, and a declaration of Miss Anderson was executed before a State of Washington Notary Public on February 11, 1997. Thus a delay of 86 days had here occurred. (13+31+31+11).

11. On April 21, 1997, two days before the year following the advent of the AEDPA, on April 24, 1996, an extensive, several hundred page State Habeas Corpus petition was filed in the Superior Court of California, which left a mere 2 days of available time to file a federal 28 U.S.C. 2254 petition following a final denial by the Supreme Court of California, unless the time of one year commenced on November 17, 1996, the date of discovery of the new evidence of petitioner's being acutely under the influence shortly before the homicide, learned during the defense investigator and defense counsel interview of Virginia Anderson, petitioner's girl friend.

12. At issue in this 28 U.S.C. 2254 petition is the commencement of the available period of one year under the AEDPA, and the alleged failure of counsel to discover the key trial witness, Virginia Anderson, through the exercise of due diligence pursuant to 28 U.S.C. 2244(d)(1)(D), and the failure/refusal of the U.S. District Court in this 28 U.S.C. 2254 petition to hold a full evidentiary hearing to resolve this issue, which affected the timeliness under the AEDPA.

13. This witness, had she been produced at trial, would have potentially reduced the degree of the homicide from second degree murder to manslaughter.

14. All of the many constitutional issues in the State Petitions for Habeas Corpus and the 28 U.S.C. 2254 petition were never resolved on their merits, solely because of a ruling that the petition was not timely filed under the AEDPA; however, had the time commenced to run upon discovery of the new evidence on November 17, 1996, the petition would have been timely filed since the time during which state petitions for habeas corpus filed on April 21, 1997, would toll the year statute until the California Supreme Court denied the habeas corpus petitions on February 3, 1998. See *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).

15. This petition for Certiorari seeks the interpretation of 28 U.S.C. 2244(d)(1)(D) and 2244(d)(2) as to newly discovered evidence, and raises the question whether such statute can be applied, as here, under the AEDPA, without the grant of a full evidentiary hearing.

ARGUMENT I

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO RULE AND DEFINE WHEN EVIDENTIARY HEARINGS MUST BE GRANTED IN 28 U.S.C. 2254 PETITIONS AFTER THE AEDPA BECAME EFFECTIVE ON APRIL 24, 1996, AND WHETHER A CERTIFICATE OF APPEALABILITY SHOULD ISSUE TO ALLOW AN

APPEAL TO THE U.S. CIRCUIT COURTS WHERE A U.S. DISTRICT COURT HAS DENIED A 28 U.S.C. 2254 PETITION WITHOUT HOLDING AN EVIDENTIARY HEARING.

A. THE LAW

At bar is presented the issue of the critical time limitation to file a 28 U.S.C. 2254 petition within the provisions of 28 U.S.C. 2244(d)(1); the instant petition filed in the U.S. District Court for the Northern District of California on June 18, 1998, would be timely, and within one year of discovering new and critical evidence on November 17, 1996, minus time deletion due to the tolling provisions of 28 U.S.C. 2244(2), i.e. "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." The U.S. District Court, without holding an evidentiary hearing to enable petitioner to show that he could not, and did not discover new and critical evidence which would have affected the degree of the homicide, dismissed the petition for, apparently, "failure to exercise due diligence" to discover the facts before November 17, 1996, pursuant to 28 U.S.C. 2244(d)(1)(D). Critically, such a determination could only be made after a full inquiry into the facts at an evidentiary hearing.

B. THE FACTS APPLIED AGAINST THE LAW

Petitioner Anchor was convicted of second degree murder in California and the conviction became final in

1990, some 6 years before the advent of the *ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT* (AEDPA) on April 24, 1996.

Thus petitioner's apparent year of eligibility to seek relief in the federal Courts would end on or about April 23, 1997.

Petitioner filed a petition for habeas corpus in the California trial level Superior Court on April 21, 1997, thus halting the running of the year period by 2 days if April 24, 1996, was the critical starting date. That Court denied relief, as did the California Court of Appeal, and, eventually, the Supreme Court of California as well, on February 3, 1998. Admittedly, then, if the date of April 24, 1996, is applicable as a starting time, petitioner had a mere two days, until February 5, 1998, to file a 28 U.S.C. 2254 petition, but did not file it until June 18, 1998. During the period of November 12, 1997 to late May, 1998, petitioner's counsel's law practice was shut down due to a severe automobile accident resulting in a broken neck and other maladies, raising the issue of "equitable tolling."

The U.S. Ninth Circuit has ruled that all the time between the initial filing of a state petition for habeas corpus in the trial level Superior Court, said filing being timely within the allowable year under the AEDPA and 28 U.S.C. 2244(d)(1), shall stop the clock until the Supreme Court of California eventually denies relief.

Petitioner asserted, and does here assert, that pursuant to 28 U.S.C. 2244(d)(1)(D) the one-year period to file his 28 U.S.C. 2254 petition should have began on November 17, 1996, the date he discovered new and

critical evidence. Petitioner asserts that he did use "due diligence" in looking for, and finally finding, this missing witness and the evidence she provided.

The United States District Court at Appendix A-10 fully agrees that the petition was timely if the available year commenced on November 17, 1996:

> "Assuming for the purposes of this motion that the statute of limitations was tolled while Petitioner was seeking habeas review in the state courts, Petitioner's application to this court would be timely if the limitations period commenced on the date Petitioner discovered Ms. Anderson's knowledge of his intoxication, November 17, 1996. The question, then, is whether Petitioner has demonstrated that through the exercise of due diligence he could not have discovered Ms. Anderson's knowledge of his intoxication prior to November 17, 1996."

This concession is, of course, accurate because if the clock began on November 17, 1996, the times elapsed would be:

November 18-30, 1996:	13 days
December, 1996:	31 days
January, 1997:	31 days
February, 1997:	28 days
March, 1997:	31 days
April 1-21, 1997:	21 days
Total:	155 days

The state writs of habeas corpus filed April 21, 1997, and not finally denied until February 3, 1998, stopped the time clock pursuant to *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). Thereafter the clock restarted, leaving:

February 4-28, 1998:	25 days
March, 1998:	31 days
April, 1998:	30 days
May, 1998:	31 days
June 1-June 18, 1998:	18 days
Total:	135 days

Thus a total of 155+135 days, or 290 days had elapsed since November 17, 1996, making timely a petition filed on June 18, 1998, by some 75 days early.

C. THE CRITICAL NEED FOR THE EVIDENTIARY HEARING PRIOR TO A NON-FACTUALLY BASED RESOLUTION OF "LACK OF DUE DILIGENCE" IN FAILING TO DISCOVER THE WHEREABOUTS OF VIRGINIA ANDERSON, PETITIONER'S EX-GIRLFRIEND, WHO COULD HAVE ESTABLISHED HIS SEVERE INTOXICATION IMMEDIATELY BEFORE THE HOMICIDE

The dual orders of the U.S. District Court set forth in the appendix reflect a recognition of factual issues that would, of necessity, have to be resolved in an evidentiary hearing to determine "due diligence" in any effort/failure of effort to locate the missing Virginia Anderson, who eventually disclosed petitioner's severe intoxication immediately preceding this homicide, that disclosure not being ascertained until November 17, 1996.

Initially, it is to be observed that the District Court recognized the critical facts re the missing testimony as setforth at page A-9, Appendix:

> Petitioner contends that the one-year limitations period did not begin to run until November

> 17, 1996, on which date Petitioner claims that he first discovered the factual predicate for at least some of his claims. On that date, Petitioner's current counsel interviewed Virginia Gutierrez Anderson, who had been Petitioner's live-in girlfriend at the time of the murder. During this interview, Ms. Anderson stated for the first time that she had spoken to Petitioner by telephone on the night of the murder, and that Petitioner had sounded extremely intoxicated. Ms. Anderson had never mentioned this telephone conversation to the police, the prosecution or the defense. Ms. Anderson testified at Petitioner's trial regarding her relationship with Petitioner and his use of drugs and alcohol in general. However, she never testified regarding Petitioner's intoxication on the night of the murder. Such testimony would have been critical, because one of the defense theories was that Petitioner had been so intoxicated that he had been unable to form the state of mind necessary for second-degree murder. The defense did not present any direct evidence that Petitioner was intoxicated on the night of the murder, and jurors who were interviewed after the trial indicated that they considered the absence of such evidence important.

Further, the District Court noted the potential resolution of these key evidentiary hearing facts:

> 1. The missing witness, Anderson, averred in her statement/affidavit "that the prosecutor never told her" of the Court's order that she talk to defense counsel, and in fact did the very opposite: "that she did not have to speak with defense counsel." (A-11, Appendix);

2. The District Court states "There is no suggestion that the prosecutor knew that Ms. Anderson had information regarding Petitioner's intoxication on the night of the murder or attempted to conceal such information." (A-11, Appendix). This surely suggests the need of the evidentiary hearing to resolve this key issue/fact. The District Court then speculates that " . . . it *appears* that defense counsel simply abandoned any effort to speak with Ms. Anderson." (A-11, Appendix). This, of course, clearly mandates an evidentiary hearing to allow the calling of trial defense counsel, and to show what extensive effort was made by the Office of the State Public Defender and later retained counsel to locate Ms. Anderson, who had married and thus had a name change, and had moved out of state.

3. At A-12, the Court again speculates, phrasing its speculation in "it *appears* . . . ", and "*presumably knew* . . . " and "no evidence of petitioner forgetting" his speaking to Anderson:

> Moreover, it appears that the defense interviewed Ms. Anderson before trial. Petitioner offers no explanation why the defense could not have obtained Ms. Anderson's information regarding Petitioner's intoxication at that time. Petitioner presumably knew that he spoke to Ms. Anderson on the night of the murder; he has not presented any evidence suggesting that he forgot speaking to her. Thus it appears that the argument regarding the prosecutor's

conduct during trial is something of a red herring.

Thus, the Order denying relief is replete with speculation as to why or why not Ms. Anderson was not earlier sought, and the need to determine a factual basis why she was not located earlier. As an aside, it is a fact that the taped interview of November 17, 1996, was not reduced to a sworn affidavit until February 11, 1997, due to the investigator suffering a heart attack resulting in his death, that event not being learned by defense counsel Hanson until late December, 1996 and the decedent's wife's inability to locate the tape of Anderson's interview in Portland, Oregon, and cause it to be reduced to affidavit form. This key fact, plus the serious automobile accident suffered by defense counsel on November 12, 1997, resulting in a broken neck and shutting down of the law practice until May, 1998, should constitute "equitable tolling," allowing the one-year statute of limitations to be tolled "if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." (*Calderon v. United States District Court* (*Kelly*), 163 F.3d 530, 541 (9th Cir. 1998)).

All of these events, including the facts of the death of the retained investigator, and defense counsel's inability to practice, should be the function of the evidentiary hearing looking toward tolling of the year statute.

Certiorari should be granted to establish guidelines throughout the nation on these issues.

ARGUMENT II

THE REFUSAL OF THE U.S. NINTH CIRCUIT TO ISSUE A CERTIFICATE OF APPEALABILITY CONFLICTS WITH OTHER MAJOR DECISIONS OF THAT CIRCUIT REQUIRING THE ISSUANCE OF THE CERTIFICATE, AND CERTIORARI SHOULD ISSUE TO SET NATION-WIDE STANDARDS FOR ISSUANCE OF THE CERTIFICATE WHERE, AS HERE, AN EVIDENTIARY HEARING IS MANDATED UNDER THE ISSUES FRAMED IN THE 28 U.S.C. 2254 PETITION, AND THE DISTRICT COURT DENIED THE EVIDENTIARY HEARING.

In a major decision, *Lambright v. Stewart*, 220 F.3d 1022 (9th Cir. 2000), the U.S. Ninth Circuit set standards for the issuance of a Certificate of Appealability (COA) pursuant to the changes wrought by the AEDPA and 28 U.S.C. 2244(d)(1) and 28 U.S.C. 2253(c)(2).

AEDPA permits a Court to issue a COA when "the appellant has made a substantial showing of the denial of a constitutional right." (220 F.3d at 1024)

To meet the "threshold inquiry" pursuant to *Slack v. McDaniel*, 529 U.S. ___, ___, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000) the petitioner "must demonstrate that the issues are debatable among jurists of reason; that a Court could resolve the issues (in a different manner); *or* that the questions are adequate to deserve encouragement to proceed further," cited in *Lambright v. Stewart*, supra at 1025.

Further, " . . . the issuance of a COA is not precluded where the petitioner cannot meet the standard to obtain a writ of habeas corpus." (220 F.3d 1022, 1025).

Indeed, the U.S. Seventh Circuit has explained that a COA shoud issue unless the claims are "utterly without merit"; *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000).

At bar, the district court dismissed the 2254 petition on the procedural ground that the year statute had elapsed prior to filing, basing this on the speculation that petitioner and his various counsel had not shown "due diligence" in trying to find the key witness who could have established petitioner's intoxication at the time of the homicide; the Court never reached some half-dozen attacks on the merits of the conviction.

Where, as here, the dismissal was based on "procedural grounds," a reviewing Court must decide two things: (a) "whether jurists of reason would find it debatable whether the petition states a valid claim of the denial of a Constitutional right," and (b) "whether jurists of reason would find it debatable whether the district court was correct in its procedural ruling," 220 F.3d 1022 at 1026, citing *Slack v. McDaniel*, 120 S.Ct. 1595, 1604.

The issue here is whether "jurists of reason" would find that an evidentiary hearing is/was necessary to determine whether or not petitioner and/or his counsel "used due diligence" in attempting to locate the missing witness, said determination seemingly being 100% dependent on facts to be developed at an evidentiary hearing. Neither the U.S. District Court nor the U.S. Ninth Circuit in denying the COA (and the evidentiary hearing, this without comment or analysis) ever discussed the *Slack v. McDaniel* requirements, nor the amplification of *Slack* as

found in *Lambright v. Stewart*, 220 F.3d 1022, 1024-1027 (9th Cir. 2000).

Therefore, failing to adhere to its own decisions, as well as those of the Seventh Circuit in *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000) Certiorari to the U.S. Court of Appeals for the Ninth Circuit should be granted to further explicate standards for issuance of the COA, and, as here, failure to afford a full evidentiary hearing.

This Court should require that a Court denying the COA specifically set forth the reasons, just as a Court granting the COA must specify the issues and reasons for granting, 28 U.S.C. 2253(c)(3).

Only then can a party seek Certiorari from that denial with any assurance of allowing this Court to make a sound evaluation of the denial of the COA. See *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242.

ARGUMENT III

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO SETTLE WHETHER THE CONCEPT OF "EQUITABLE TOLLING" CAN BE INVOKED BY A PETITIONER IN A 28 U.S.C. 2254 OR 2255 PETITION WHERE NECESSARY TO HALT THE RUNNING OF THE ONE-YEAR STATUTORY PERIOD UNDER THE AEDPA AND 28 U.S.C. 2244(d)(2).

In *Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998) a panel of the Ninth Circuit recognized the concept/doctrine of "equitable tolling" to

halt the running of the clock in the year allowed under the AEDPA and 28 U.S.C. 2244(d)(2) to file a 28 U.S.C. 2254 or 2255 petition.

At bar more timely state petitions for habeas corpus could not have been filed earlier than April 21, 1997, due to a defense investigator suffering a heart attack and death in December, 1996, counsel not learning of it for over a month after that investigator had participated with counsel in a meeting and a tape recording made of that meeting with Virginia Anderson on November 17, 1996, in Portland, Oregon. The investigator was expected to transform the taped interview into an affidavit for Anderson's signature and, of course, that affidavit was to be, and in fact was, one of the merits in petitioner's state habeas corpus petition eventually filed April 21, 1997. The delay between November 17, 1996 and the date of execution of the affidavit on February 11, 1997, was (13+31+31+11)=86 days, during which the state petition was delayed completion, and filing. Had the petition been filed 86 days earlier, just for the sake of mathematics, it would have been filed on or about January 25, 1997, thus stopping the clock with (6+31+30+31+31+30+31+30+31+25) days or 276 elapsed days after April 24, 1996, leaving 365-276=89 days, rather than a mere two days, to seek 28 U.S.C. 2254 relief after the California Supreme Court denied the state habeas petitions. See *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999) holding that the statue of limitations is tolled "from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge."

Neither petitioner nor his counsel could have anticipated, nor could they have controlled or avoided the heart attack and death of this investigator. Even after learning of it, the decedent investigator's wife looked long and about their home, for the tape of the Anderson interview, and eventually found it, and an affidavit of Virginia Anderson was obtained on February 11, 1997. An examination of the several hundred page state petition for Writ of Habeas Corpus easily convinces that a two month time to prepare it and file it on April 21, 1997, was not inordinate nor unreasonable.

Invocation here of the doctrine of "equitable tolling" would allow this petitioner to have his meritorious multi-issue 28 U.S.C. 2254 petition heard on the merits, a clearly desirable alternative than its current mechanical denial without an evidentiary hearing. Therefore, Certiorari should be granted to establish whether the doctrine/ concept of "equitable tolling" should be recognized on national basis under the AEDPA and 28 U.S.C. 2244(d)(2). The record and Appendix A fails to reveal this reason of "equitable tolling," the court focusing solely on the April 24, 1996 starting time, and denying the 28 U.S.C. 2254 petition on procedural grounds under 28 U.S.C. 2244(d)(1)

CONCLUSION

Certiorari to the U.S. Court of Appeals for the Ninth Circuit should issue to resolve serious issues when (1) A COA should issue; (2) when a U.S. District Court must hold a full evidentiary hearing before dismissing a 28

U.S.C. 2254 petition; and (3) whether the doctrine/concept of "equitable tolling" should be allowed, in an appropriate factual situation, to halt temporarily the running of the year's time available post AEDPA and 28 U.S.C. 2244(d)(1) to file a petition under 28 U.S.C. 2254 or 2255.

Dated: December 18, 2000, at Santa Ana, Orange County, California.

Respectfully submitted,

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Counsel to Petitioner,
Dean Robert Anchor
Member of the Bar
United States Supreme Court

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DEAN ROBERT ANCHOR, Petitioner, v. R.Q. HICKMAN, Warden, Respondent.	Case Number C-98-20813-JF ORDER[1] GRANTING MOTION TO DISMISS PETITION AS UNTIMELY [Docket No. 4] (Filed Sep. 29, 1999)

Before the Court is Respondent's motion to dismiss the petition as untimely. The motion was taken under submission without oral argument. The Court, having considered all of the arguments and evidence submitted by the parties, concludes that the motion must be granted for the reasons set forth below.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214, imposed for the first time a statute of limitations on habeas petitions filed in federal court by state prisoners. Such petitions must be filed within one year after the date on which the state court judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. *See* 28 U.S.C. § 2244(d)(1). The one-year

[1] This disposition is not designated for publication and may not be cited.

period is tolled during the pendency of a properly filed application for state post-conviction relief or collateral review. *See id.*, § 2244(d)(2).

Petitioner's state court judgment of conviction for second degree murder became final in 1988, prior to the enactment of the AEDPA. Accordingly, the one-year limitations period began to run on the AEDPA's effective date, April 24, 1996 and, absent tolling, expired on April 23, 1997. *See Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1287 (9th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 899 (1998), *overruled in part on other grounds, Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (*en banc*).

On April 21, 1997, two days before the expiration of the one-year period, Petitioner, represented by counsel, filed a habeas petition in the California Superior Court. The Superior Court denied the petition on June 26, 1997 on the ground of unjustifiable delay. Petitioner filed a habeas petition in the California Court of Appeal on November 5, 1997. The Court of Appeal issued a summary denial on November 19, 1997. Petitioner filed a petition for review in the California Supreme Court on December 2, 1997. The California Supreme Court denied review on February 3, 1998.

For purposes of the present motion, this Court assumes without deciding that the statute of limitations was tolled during the entire period during which Petitioner sought collateral review in the California courts, that is, from April 21, 1997 until February 3, 1998. *See Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999) (holding that the statute of limitations is tolled "from the time the

first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge").[2] Taking this period into account, Petitioner was required to file his federal habeas petition by February 5, 1998. Petitioner did not file the petition until June 18, 1998.

Petitioner contends that he is entitled to equitable tolling. The one-year statute of limitations may be subject to equitable tolling "if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998) (internal citation and quotations omitted). Petitioner's counsel, solo practitioner Roger S. Hanson, submits a declaration stating that he was involved in a serious car accident on November 12, 1997, shortly after the California Court of Appeal denied Petitioner's habeas petition. As a result of the

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[2] Respondent suggests that because Petitioner's applications for relief in the state courts were denied on the basis of undue delay, these applications were not "properly filed" and thus did not toll the statute of limitations. The Ninth Circuit's opinion in *Nino* expressly refrained from deciding whether a habeas petition ultimately dismissed by the California courts on the basis of undue delay is "properly filed" for tolling purposes. *Nino*, 183 F.3d at 1007 n.4. A subsequent Ninth Circuit opinion could be read as suggesting that such a petition is not "properly filed." *See Dietado v. Ducharme*, ___ F.3d ___, 1999 WL 646953, at *3 (9th Cir. Aug. 26, 1999) (holding that a personal restraint petition dismissed by the Washington courts as time-barred and successive was not "properly filed" for tolling purposes). This Court need not reach the issue in order to decide the present motion, because, even assuming that Petitioner's state court applications did toll the statute of limitations, the petition must be dismissed as untimely.

accident, Mr. Hanson suffered a broken neck, other broken bones, a dislocated hip and a brain concussion. Although Mr. Hanson was under heavy medication and in a constant state of drowsiness, he managed to direct his secretary to prepare a petition for review which he caused to be filed in the California Superior Court on December 2, 1997. The California Supreme Court's denial of the petition was sent to Mr. Hanson's office in early February 1998, although Mr. Hanson has no recollection of this event. Mr. Hanson states that he was not able to resume his practice until May 1998, at which time he sent the present habeas petition to Petitioner for signature. Petitioner signed the petition on May 22, 1998. Mr. Hanson has no record of when the petition was returned to him bearing Petitioner's signature. The petition was not filed until June 18, 1998. No explanation is offered for this delay of nearly one month between the signing of the petition and its filing.

The Court concludes that these facts do not justify the application of the equitable tolling doctrine. There is no statutory or constitutional right to the assistance of counsel in a noncapital habeas case. *See Oritz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998). Accordingly, although Petitioner was entitled to retain Mr. Hanson for the purpose of timely filing a habeas petition in federal court, it is unclear that Mr. Hanson's failure to do so – for whatever reason – ever could create the extraordinary circumstances necessary to invoke equitable tolling. *See Sandvik v. United States*, 177 F.3d 1296, 1272 (11th Cir. 1999) (holding that failure of petitioner's counsel to mail petition early enough to ensure timely filing did not constitute extraordinary circumstances justifying tolling of one-year

limitations period); *Paige v. United States*, 171 F.3d 559, 561 (8th Cir. 1999) (holding that prisoner who asked another prisoner to draft motion and mail it back to him voluntarily assumed the risk of late delivery and thus was not entitled to equitable tolling).

Even assuming that the Court was prepared to apply equitable tolling principles to the portion of the delay caused by Mr. Hanson's injuries, the record shows that Petitioner actually had the petition in hand and signed it on May 22, 1998. Giving Petitioner the benefit of every doubt and assuming that the one-year period resumed running on that date, the period expired two days later on May 24, 1998. No explanation is given for the fact that the petition was not filed until twenty-five days later, on June 18, 1998. In the absence of any explanation for this delay, the Court cannot find that extraordinary circumstances beyond Petitioner's control made it impossible for him to file the petition within the one-year period.

Based upon the foregoing, the motion to dismiss is GRANTED and the petition is DISMISSED as untimely.

DATED: 9-29-99

/s/ Jeremy Fogel
JEREMY FOGEL
United States District Judge

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DEAN ROBERT ANCHOR, Petitioner, v. R.Q. HICKMAN, Warden, Respondent.	Case Number C-98-20813-JF ORDER DENYING RELIEF FROM JUDGMENT OF DISMISSAL (Filed Nov. 29, 1999)

Petitioner's request for relief from judgment will be denied for the reasons set forth below.

I. BACKGROUND

Petitioner was convicted of second-degree murder for the killing of Linnea Green. Ms. Green was found dead on July 3, 1985 in the basement apartment inhabited by Petitioner and his then-girlfriend, Virginia Gutierrez Anderson. Petitioner's conviction became final in 1990[1] when the California Supreme Court denied his petition for review. No action was taken on Petitioner's behalf for approximately six years. It appears that Petitioner was

[1] Papers submitted by the parties in connection with earlier motions indicated that Petitioner's conviction became final in 1988, which date is reflected in the Court's prior order of September 29, 1999. However, it appears from papers currently before the Court that the conviction became final in 1990.

represented by an attorney for some portion of this six-year period, but that the attorney did no work on his case. Petitioner's current counsel was retained in late 1995 or early 1996, at which point he began an investigation of Petitioner's case.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act"), P.L. 104-132, 110 Stat. 1214, became effective. The Act for the first time imposed a one year statute of limitations on the filing of habeas petitions in federal district court. The one year period runs from the latest of (1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (2) the date on which the impediment to filing an application created by state action is removed; (3) the date on which the constitutional right asserted initially was recognized by the Supreme Court; or (4) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. *See* 28 U.S.C. § 2244(d). Where the judgment became final before the Act's effective date, the one year period runs from the Act's effective date unless application of § 2244(d) indicates that the period runs from a later date.

Petitioner filed the present petition in this Court on June 18, 1998. Respondent moved to dismiss the petition as untimely because it was filed more than one year after the Act's effective date and Petitioner had not demonstrated that the one-year period commenced on a later date. Petitioner filed an opposition brief containing a single argument based upon tolling. Specifically, Petitioner argued that the one-year limitations period was

tolled while he sought habeas review in the California courts and while his attorney was incapacitated due to serious injuries suffered in an automobile accident. This Court concluded that the petition was untimely even if the Court allowed for tolling while Petitioner was seeking habeas review in the state courts and while his attorney was incapacitated. Accordingly, the Court granted Respondent's motion and issued a judgment of dismissal on September 29, 1999.

On October 3, 1999, Petitioner filed the present motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). The Rule 60(b) motion is based upon the assertion of Petitioner's counsel that, although the brief filed in opposition to the dismissal motion contained only a single argument based upon tolling, the brief should have contained additional arguments based upon delayed discovery of the grounds giving rise to the claims for relief. Counsel states that he drafted in longhand an opposition brief discussing both tolling and delayed discovery, and that his secretary inadvertently omitted the delayed discovery arguments when she typed the brief. Counsel states that he did not review the brief after it had been typed and so did not catch the error before the brief was filed. Petitioner requests that the Court consider the delayed discovery arguments at this time. Respondent contends that the judgment of dismissal should be affirmed even if the Court considers the delayed discovery arguments presented in the Rule 60(b) motion.

II. DISCUSSION

The Court will accept at face value counsel's representation that the arguments based upon delayed discovery inadvertently were omitted from the opposition brief. The Court will consider those arguments at this time.

Petitioner contends that the one-year limitations period did not begin to run until November 17, 1996, on which date Petitioner claims that he first discovered the factual predicate for at least some of his claims. On that date, Petitioner's current counsel interviewed Virginia Gutierrez Anderson, who had been Petitioner's live-in girlfriend at the time of the murder. During this interview, Ms. Anderson stated for the first time that she had spoken to Petitioner by telephone on the night of the murder, and that Petitioner had sounded extremely intoxicated. Ms. Anderson had never mentioned this telephone conversation to the police, the prosecution or the defense. Ms. Anderson testified at Petitioner's trial regarding her relationship with Petitioner and his use of drugs and alcohol in general. However, she never testified regarding Petitioner's intoxication on the night of the murder. Such testimony would have been critical, because one of the defense theories was that Petitioner had been so intoxicated that he had been unable to form the state of mind necessary for second-degree murder. The defense did not present any direct evidence that Petitioner was intoxicated on the night of the murder, and jurors who were interviewed after the trial indicated that they considered the absence of such evidence important. Petitioner contends that he could not have discovered Ms. Anderson's knowledge of his intoxication earlier than November 1996, in part because the prosecutor interfered with

defense counsel's efforts to interview Ms. Anderson during the trial. Some of Petitioner's claims for relief are grounded upon allegations of prosecutorial misconduct.

Assuming for the purposes of this motion that the statute of limitations was tolled while Petitioner was seeking habeas review in the state courts,[2] Petitioner's application to this Court would be timely if the limitations period commenced on the date Petitioner discovered Ms. Anderson's knowledge of his intoxication, November 17, 1996. The question, then, is whether Petitioner has demonstrated that through the exercise of due diligence he could not have discovered Ms. Anderson's knowledge of his intoxication prior to November 17, 1996.

Petitioner argues that the prosecutor interfered with defense counsel's efforts to interview Ms. Anderson during the trial, and that had defense counsel been able to conduct a meaningful interview with Ms. Anderson the information regarding Petitioner's intoxication might have been revealed. According to affidavits from Petitioner's defense counsel, defense counsel wanted to interview Ms. Anderson during the course of trial but could

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[2] As the Court noted in its order of September 29, 1999, Respondent questions whether the statute of limitations was tolled while Petitioner was pursuing relief in state court. Respondent contends that because the state court applications were denied on the basis of undue delay, they were not "properly filed" and thus did not toll the statute of limitations. The Court need not reach this issue in order to decide the present motion, because, even assuming that the state court applications did toll the statute of limitations, the motion for relief from the judgment of dismissal must be denied.

not locate her. After raising the issue before the trial court, defense counsel discovered that the prosecutor was housing Ms. Anderson in a motel located near the courthouse. The trial court ordered the prosecutor to make Ms. Anderson available for interview by the defense, and further ordered that Ms. Anderson could not refuse to be interviewed. Ms. Anderson now states that the prosecutor never told her that she had to speak with defense counsel and in fact told her that she did *not* have to speak with anyone. According to the affidavits of Petitioner's defense counsel, Ms. Anderson was uncooperative and refused to engage in a meaningful interview. Defense counsel states that "Ms. Anderson refused to submit to an interview and told us that she would testify only as a witness from the stand. Because of this position taken by Anderson, the defense did not and could not risk calling her."

Petitioner's argument that the prosecutor's conduct prevented a meaningful interview with Ms. Anderson is unpersuasive. There is no suggestion that the prosecutor knew that Ms. Anderson had information regarding Petitioner's intoxication on the night of the murder or attempted to conceal such information. At most, the prosecutor failed to convey the trial court's order that Ms. Anderson speak to the defense. The remedy for such failure lay in the hands of defense counsel, who could have returned to the trial court and requested enforcement of the prior order. Instead, it appears that defense counsel simply abandoned any effort to speak with Ms. Anderson.

Moreover, it appears that the defense interviewed Ms. Anderson before trial. Petitioner offers no explanation why the defense could not have obtained Ms. Anderson's information regarding Petitioner's intoxication at that time. Petitioner presumably knew that he spoke to Ms. Anderson on the night of the murder; he has not presented any evidence suggesting that he forgot speaking to her. Thus it appears that the argument regarding the prosecutor's conduct during trial is something of a red herring.

Finally, Petitioner fails to provide an adequate explanation as to why he made no attempt to contact Ms. Anderson until 1996, nine years after the judgment of conviction was rendered and six years after the judgment became final. Petitioner blames the delay in part upon his prior attorney. However, it appears that this attorney represented him for only a portion of the time in question. Petitioner has not explained his own failure to act during the time he was unrepresented. Moreover, to the extent that Petitioner is contending that his prior attorney's lack of diligence should not be attributed to him, Petitioner cites no supporting authority. As is stated in this Court's order of September 29, 1999, there is no statutory or constitutional right to the assistance of counsel in a noncapital habeas case. *See Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998). Thus it does not appear that Petitioner's retention of counsel to pursue habeas relief could insulate him from the diligence requirement. Because Petitioner has failed to demonstrate why his prior attorney could not have discovered Ms. Anderson's information regarding Petitioner's intoxication, Petitioner has failed to demonstrate that such information could not

have been discovered in the exercise of due diligence prior to November 17, 1996.

Based upon the Petitioner's failure to demonstrate that the statute of limitations commenced on a date other than the Act's effective date, April 24, 1996, Petitioner's motion for relief from judgment must be denied.

III. ORDER

Petitoner's motion for relief from the judgment of dismissal is DENIED.

DATED: 11-29-99

/s/ Jeremy Fogel
JEREMY FOGEL
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT ANCHOR, Petitioner-Appellant, v. R.Q. HICKMAN Respondent-Appellee.	No. 00-15185 DC# CV-98-20813-JF Northern California (San Jose) ORDER (Filed Sep 21, 2000)

Before: WALLACE and FERNANDEZ, Circuit Judges

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2244(d)(1).